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In the Supreme Court of the United States

OCTOBER TERM, 1995

CARRIE JAFFEE, AS SPECIAL ADMINISTRATOR FOR RICKY ALLEN, SR., DECEASED, PETITIONER,

v.

MARYLU REDMOND, HOFFMAN ESTATES POLICE OFFICER, AND VILLAGE OF HOFFMAN ESTATES, ILLINOIS, RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE MENNINGER FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a psychotherapist-patient privilege exists under Federal Rule of Evidence 501.

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BRIEF OF THE MENNINGER FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS*

INTEREST OF THE AMICUS CURIAE

The Menninger Foundation is a Kansas not-for-profit corporation which owns and operates the Menninger Clinic in Topeka, Kansas. The Menninger Clinic ("Menninger") was founded in 1925 and is now one of the nation's foremost

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* Consents to the filing of this brief have been lodged with the Clerk.

psychiatric hospitals.[1/] Menninger provides a complete continuum of care to patients from all over the country, ranging from out-patient evaluations to in-patient hospitalization, and offers treatment for virtually every form of mental illness. Each patient at Menninger is cared for by a "treatment team" led by a psychiatrist. Other members of the "core treatment team" include a psychiatric social worker, a clinical psychologist, a registered nurse with advanced training in psychiatric nursing, and an activity therapist. All members of the team provide care directly to the patient.

The Court of Appeals has confirmed what psychotherapists at Menninger have known from the beginning: in order to perform effective psychotherapy, clinicians must be able to assure their patients of the confidentiality of their relationship and, in so doing, establish a relationship built on trust. Although there may be limits to the confidentiality of this relationship, the fundamental presumption of confidentiality is essential to the successful treatment and cure of mental illness.

Menninger has created an attentive, therapeutic and nurturing environment for its patients and staff. This environment depends entirely upon the trust built between Menninger staff and patients. Without the psychotherapist-patient privilege recognized by the Court of Appeals in this case, that trust would be endangered and the important work of Menninger and other psychiatric hospitals would be put at risk. Accordingly, the amicus has a direct interest in the outcome of this case because it will determine the threshold issue of whether or not a therapist-patient privilege exists under federal law. It is essential to the amicus that federal law recognize the confidentiality of communications between psychotherapists and patients.

1/ In its national survey of psychiatrists, U.S. News & World Report (July 24, 1995) ranked the Menninger Clinic the best psychiatric hospital in the United States.

SUMMARY OF ARGUMENT

This Court should protect the confidentiality of mental health communications by recognizing a psychotherapist-patient privilege. Patients in psychotherapy confide the most intimate details of their lives and their innermost thoughts to psychotherapists. Without a promise that these communications will be held in confidence, patients either will not seek psychotherapy or the therapy process will be irreparably damaged.

Federal Rule of Evidence 501 provides that privileges in federal question cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Reason and experience strongly support a psychotherapist-patient privilege. Federal law already recognizes the importance of maintaining the confidentiality of mental health communications. Proposed Rule 504, legislative reports, relevant legislation and Executive Department regulations all support a psychotherapist-patient privilege. All fifty states and the District of Columbia protect mental health communications. Moreover, traditional concepts of common law privacy support the privilege. Finally, the benefits of the privilege (and the costs of not adopting it) greatly outweigh any inconvenience to litigants.

This Court should affirm the Court of Appeals and recognize the psychotherapist-patient privilege.

ARGUMENT

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IS CRITICAL TO THE SUCCESS OF PSYCHOTHERAPY AND FURTHERS IMPORTANT SOCIETAL GOALS.

A. The Confidential Basis of Communications Between Psychotherapist and Patient.

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand.[2/]

The relationship between psychotherapist and patient is unlike any other dynamic between two people.[3/] The patient reveals more than objective fact; he reveals who he is at the core. That is not an easy task for anyone. It requires courage, commitment, confidence and, most importantly, trust in the therapist who hears the patient's revelations.

The patient's relationship to a therapist is not unlike the priest-penitent relationship. The penitent offers what is most

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[2/] Guttmacher & Weihofen, *Psychiatry and the Law* 272 (1952), quoted in *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955).

[3/] Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 185 (1960).

deeply kept inside him, what burdens his conscience. The penitent offers these intimate and confidential thoughts because he believes the priest will keep that communication with the trust of God. Of course, the penitent is protected by the seal of confession and thus knows that what he says will never be revealed. A religious confession without the seal is a self-accusation waiting to be spread to the world.

Likewise, the psychotherapist-patient relationship exists to reveal something most intimate, as painful as self-accusation of sin, namely mental anguish and fear. Few patients would reveal absolutely everything about themselves without assurance that what they say will not be repeated.

Even Sigmund Freud conceived of psychoanalysis[4/] as a secular form of confession:

> [The patient] is to tell us not only what he can say authentically and willingly, what will give him relief like a confession, but everything else as well that his self observation yields him, everything that comes into his head, even if it is *disagreeable* for him to say it, even if it seems *unimportant* or actually *nonsensical*.[5/]

[4/] Psychoanalysis is a psychotherapeutic technique for diagnosing and treating mental and emotional disorders through ascertaining and analyzing the facts of the patient's mental life. *Dorland's Medical Dictionary, Shorter Edition* 567 (1980).

[5/] Freud, *An Outline of Psychoanalysis*, in *Standard Edition of the Complete Psychological Works of Sigmund Freud* 141 (1964) (emphasis in original), quoted in Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. Rev. 893, 896 (1982).

B. Psychotherapy Without the Privilege.

The psychotherapist-patient relationship is based on trust and confidence.[6/] Without trust and confidence, a chill would be cast upon the relationship between therapist and patient. Thus, without the protection of a privilege, fewer people will seek therapy.[7/] As explained by prominent psychologist David C. Clark[8/] in a letter to your amicus:

> Empirical studies of epidemiological trends in the United States consistently document that most persons with major psychiatric disorders and most persons with problems do *not* choose to see a mental health professional for help—this reluctance is related to social stigma, real and perceived expense, uncertainty about the usefulness of mental health services, fear of disclosure, and an acute sense of privacy. It is clear that even *fewer* people in need of help would seek mental health services if they knew or believed that patient-therapist communications were not privileged.

The fear of public disclosure is substantial. The patient risks psychological harm from public revelations of mental disorders.[9/] In addition, mental illness carries a social

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[6/] Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?*, 18 Am. J. Trial Advoc. 721 (1995).

[7/] Slovenko, *Psychiatry and a Second Look*, *supra* n.3, at 187.

[8/] Professor of psychiatry and psychology at Rush Medical College (one of the nation's leading medical schools and teaching hospitals) and director of the Center for Suicide Research and Prevention at Rush-Presbyterian-St. Luke's Medical Center.

[9/] Shuman & Weiner, *The Psychotherapist-Patient Privilege* 112 (1987).

stigma. Commentators routinely note that "people view mental illness as more embarrassing than physical illness."[10/] Government surveys have concluded that "the public generally fears and dislikes the mentally ill and believes them to be unpredictable and untrustworthy."[11/] So strong is the public's fear of stigma that many people choose to pay their own therapy bills rather than submit them to insurers whose records may be available to an employer.[12/] The fear of stigma causes psychological harm. As one expert put it, "subjecting a psychiatric patient to fear of public disclosure and stigmatization is a form of patient abuse."[13/]

It is not in society's interest to place painful barriers in the way of effective therapy. If people who need help do not seek therapy or go about it in a guarded, ineffective way, they may fail to address psychological problems that ultimately could render them dangerous. Although it is impossi-

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[10/] Shuman & Weiner, *The Privilege Study*, *supra* n.5 at 897, citing Guttmacher & Weihofen, *Psychiatry and the Law*, *supra* n.2 at 271; *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1193, 1200 (1974).

[11/] Cerveny & Kent, *Evidence Law: The Psychotherapist-Patient Privilege in Federal Courts*, 59 Notre Dame L. Rev. 791, 798 (1984), citing H.E.W., *Public Opinions and Attitudes About Mental Health* (Gov't Printing Office 1963).

[12/] Domb, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & Health 209, 222 (1990/91), citing Note, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 Duke L.J. 1217, 1228 (1985).

[13/] Slovenko, *Accountability and Abuse of Confidentiality in the Practice of Psychiatry*, 2 Int'l J. L. & Psychiatry 431, 442 (1979).

ble to quantify this risk, common sense suggests that society will be better served if those needing mental health services are encouraged to obtain it, rather than be frightened away from professionals.[14/] Dr. Clark confirms the dangers of placing barriers in the way of mental health treatment:

> The psychopathology that afflicts and impairs so many psychiatric and psychological patients only serves to make them more reserved, withdrawn, distrustful, and suspicious. When a patient can be reassured that his/her communication with the therapist is protected by law, so that no third party can have access to that information, many (not all) patients will talk frankly with their therapist about concerns, symptoms, and history. In the absence of confidentiality safeguards, therapists simply cannot assess, diagnose, and treat patients adequately. This is particularly true in the area of suicide risk assessment and treatment, my own area of expertise. *Patients will not be frank about their suicidal or homicidal thoughts with the therapist unless that therapist can offer legal reassurance that all communications will be safeguarded as confidential up to the point where a person must be protected from dangerous behavior*. (Emphasis added).

The Court of Appeals also recognized this:

> The need, and demand, for counseling services has skyrocketed during the past several years due to the rapid spread of violence and crime throughout our nation. * * * The recognition of a psychotherapist/patient privilege can only serve to encourage troubled individuals, as well as those who witness,

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14/ It is also logical to infer that the more the mentally ill are able to take advantage of treatment opportunities, the more likely they will become productive members of society.

> participate in, and are intimately affected by acts of violence in today's stressful, crime ridden, homicidal environment, to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors.

Jaffee v. Redmond, 51 F.3d 1346, 1355 (7th Cir.), cert. granted, 116 S.Ct. 334 (1995).

Although much of the empirical research on the chilling effects of denying a privilege to psychotherapist-patient communications has been inconclusive,[15/] *all* of the leading studies conclude that the confidentiality of the psychotherapist-patient relationship is important to the patient.

For example, petitioner cites a 1982 work in which Daniel Shuman and Dr. Myron Weiner surveyed Texas citizens with respect to the population's attitudes toward psychotherapy under the state's new psychotherapist-patient privilege law. See Pet. Br. at 28. Although Shuman and Weiner concluded that their "group of patients very clearly viewed confidentiality as a requisite for a trust necessary for

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15/ *E.g.*, Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures*, 21 Prof. Psych.: Research and Practice 72 (1990). This study purports to show that the existence of a privilege does not affect patients' willingness to disclose information, but Taube and Elwork admit that their findings are severely limited and *cannot* be used to support any legislative action for or against the psychotherapist-patient privilege. See also Nowell & Spruill, *If It's Not Absolutely Confidential, Will Information Be Disclosed?*, 24 Prof. Psych.: Research and Practice 367 (1993). Nowell and Spruill likewise caution that their findings are inconclusive as to the general population because their sampling consisted solely of college students in an introductory psychology course.

therapy,"[16] they also found that "when asked on what they relied most heavily to guarantee the privacy of their communication with the therapist, patients stated that they relied much more strongly on the therapist's ethics than on a statutory guarantee of privilege."[17] Yet they also found that "most of the patients were unaware of the privilege,"[18] leading one to question whether the sample group simply lacked a legal understanding of the differences between "privilege law" and professional ethical obligations. Most significantly, the sample population believed that comments to a psychotherapist *would* remain confidential and undisclosed. In the end, this study supports the argument that, absent trust and confidentiality, patients will be more guarded and less forthcoming with therapists.[19]

Other studies confirm that people will be more likely to seek therapy or be more open in therapy if they can expect confidentiality. One study revealed that of 108 randomly selected "potential patients," "42 percent of the sample reported they would be less likely to be open in therapy than

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[16] *The Privilege Study*, *supra* n.5 at 926.

[17] *Ibid.*

[18] *Id.* at 925.

[19] Moreover, Shuman and Weiner reached their conclusions after an examination of *insurance* claims. From insurance data, they concluded that "no surge of new patient or psychotherapy sessions followed in the first full year of the privilege's enactment." *Ibid.* This is not surprising, however, in light of the fact that many people pay for their own therapy rather than submit claims to insurers. *Ibid.* Indeed, those most concerned about confidentiality are unlikely to disclose such treatment to their insurers.

if their communications would be absolutely protected."[20] Another study surveyed teachers and school administrators, 83 percent of whom said they did not want to reveal to state authorities whether they had ever sought mental health treatment.[21] In addition, a study of college students showed strong support for the confidentiality of psychotherapist-patient communications.[22]

Similarly, a study of the effect of asking about mental health treatment on state bar applications found that "students anticipating bar examinations and the extensive inquiry that accompanies them may avoid professional mental health consultation for fear of 'damaging' their record and delaying their admission while an investigation of fitness ensues."[23]

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[20] Appelbaum, Kapen, Walters, Lidz, & Roth, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 Bull. Am. Acad. Psychiatry L. 109, 110 (1984), citing Comment, *Functional Overlap between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1126 (1962).

[21] *Ibid.*, citing Rosen, *Do Potential Community Mental Health Center Clients Want Privacy?*, unpublished manuscript, cited in Noll & Rosen, *Privacy, Confidentiality, and Informed Consent in Psychotherapy*, in *Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence* (1982).

[22] Stevens & Shearer, *An Assessment of Nonprofessionals' View on Confidentiality*, unpublished manuscript, cited in Noll & Rosen, *Privacy, Confidentiality, and Informed Consent* in *Psychotherapy, Psychiatric Patient Rights and Patient Advocacy: Issues and Evidence* (1982).

[23] Edson, *Mental Health Status Inquiries On Bar Applications: Overbroad and Intrusive*, 43 U. Kan. L. Rev. 869, 880 (1995), citing Maher & Blum, *A Strategy for Increasing the Mental and Emotional Fitness of Bar Applicants*, 23 Ind. L. Rev. 821, 826-827 (1990).

See also *Clark v. Virginia Board of Bar Examiners*, 880 F. Supp. 430, 437-38 (E.D. Va. 1995).

The success of psychotherapy depends on the patient's full disclosure; without it the therapy is ineffective. As the Group for the Advancement of Psychiatry found in 1960, the psychotherapist's "capacity to help his patients is completely dependent upon their willingness to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patient of confidentiality and, indeed privileged communication."[24/] In short, "A privilege for those receiving psychotherapy is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients."[25/]

As explained by Dr. W. Walter Menninger[26/] in a statement to your amicus:

> In the absence of the guaranty of confidentiality, the basic trust in the psychotherapist's relationship with the patient is compromised. This basic trust is essential for the psychotherapeutic process to go forward.

24/ Cerveny & Kent, *Evidence Law*, *supra* n.11 at 797, quoting 4 Group for the Advancement of Psychiatry, *Reports and Symposiums*, No. 45, at 95 (1960).

25/ Slovenko, *Psychiatry and a Second Look*, *supra* n.3 at 199.

26/ President and Chief Executive Officer of the Menninger Foundation and Clinic, Professor and former Dean of the Karl Menninger School of Psychiatry and Mental Health Services, Clinical Professor of Psychiatry at Kansas University School of Medicine and Senior Faculty Member of the Topeka Institute for Psychoanalysis.

II. IN LIGHT OF REASON AND EXPERIENCE, THIS COURT SHOULD RECOGNIZE THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

A. Federal Law Supports the Recognition of a Psychotherapist-Patient Privilege.

Federal Rule of Evidence 501 states in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

By adopting Rule 501 instead of rules delineating specific, enumerated privileges, "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis, and to leave the door open to change." *Trammel v. United States*, 445 U.S. 40, 47 (1980) (internal quotation marks and citation omitted). See also *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984) ("Indeed, Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them. Congressional failure to codify this privilege is therefore irrelevant to our inquiry") (citations omitted).[27/]

27/ Accordingly, because they tend to rely exclusively on the absence of a clear privilege in earlier periods of the common law, the decisions of the courts of appeals that decline to recognize a psychotherapist-patient privilege apply the wrong legal standard. See generally *In re Doe*, 964 F.2d 1325, 1328

(continued...)

That *all fifty states*, *Congress* and the *Executive Branch* have endorsed a mental health professional-patient privilege amply demonstrates that "reason and experience" support such a privilege. These branches of the government have implemented confidentiality restrictions applicable not only to psychiatrists and psychologists, but also to the therapists and social workers who are so indispensable to modern mental health care. Indeed, Congress and the Executive Branch have expressed the view that confidential communications in the professional mental health treatment setting are as worthy of protection as those between attorneys and clients or between clergy and penitents.

At the outset, this Court has explained that the attorney-client, physician-patient and clergy-penitent privileges

> are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly

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[27/](...continued)
(2d Cir. 1992) ("The cases rejecting the privilege are not helpful, however, because they are founded on the view that Rule 501 limits the development of privileges to those recognized by the common law, a position that we regard as contrary to the teaching of *Trammel* 'not to freeze the law of privilege'"). See also *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.) (refusing recognition of psychotherapist-patient privilege "[b]ecause our discretion under Rule 501 is limited to the development of privileges extant in the common law"), cert. denied sub nom. *Doe v. United States*, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988) (stating that "evidentiary privileges in federal criminal cases are governed by common law unless modified or expanded by an Act of Congress, the Constitution or rule prescribed by the Supreme Court"), cert. denied, 489 U.S. 1084 (1989).

> consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

Trammel, 445 U.S. at 51.

These considerations are equally applicable to the relationship between mental health care professionals and patients. Proposed Federal Rule of Evidence 504, adopted by the Judicial Conference of the United States,[28/] stated in part:

[28/] That recommendation furnishes substantial evidence that the psychotherapist-patient privilege merits recognition under Rule 501. See *United States v. Gillock*, 445 U.S. 360, 367 (1980) (noting that "[n]either the Advisory Committee, the Judicial Conference, nor this Court saw fit, however, to provide [in the proposed Rules] the [state legislator] privilege sought by Gillock"). Although Congress ultimately elected not to accept proposed Rule 504, it specifically stated that its decision was *not a rejection of the privilege*:

> It should be clearly understood that, in approving this general rule as to privileges [that is, Rule 501], the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. Rep. No. 1277, 93d Cong., 2d Sess. 13 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059. See also *Weber Aircraft Corp.*, 465 U.S. at 803 n.25; *Trammel*, 445 U.S. at 47.

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

In explaining the rationale for proposed Rule 504, the Judicial Conference Advisory Committee observed that a psychiatrist's ability to help patients

> is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure * * * patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule * * *, there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client.

Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (ellipses in original), quoting Group for the Advancement of Psychiatry, *supra* n.24 at 92.

Proposed Rule 504(a)(2), however, contained a narrow definition of "psychotherapist" which effectively included only physicians and licensed psychologists. Refusal to apply the privilege to other qualified mental health professionals is not supported by principle,[29/] fails to account for the reali-

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[29/] A number of courts have equated the psychotherapist-patient relationship with the physician-patient relationship, but they are not the same. *In re Grand Jury Proceedings*, 867 F.2d (continued...)

ties of modern mental health care and is contrary to the judgments expressed by Congress, the executive branch and numerous states. See 25 Wright & Graham, *Federal Practice and Procedure* § 5525, at 187 (1989 & Supp. 1995) (noting arbitrariness of Rule 504(a)(2)'s formulation because, among other reasons, a highly trained professional would be excluded "simply because the state in which she practiced did not have a licensing scheme for psychologists or because she was employed in a public institution and was exempt from the licensing requirement") (footnotes omitted); 23 Wright & Graham, *supra*, § 5429, at 817-20 (recommending that the privilege encompass social workers delivering mental health care).[30/]

[29/](...continued)
562 (9th Cir.), cert. denied, 493 U.S. 906 (1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988), cert. denied, 489 U.S. 1084 (1976). A person in therapy reports what he feels, not just what he knows. Much of what a physician does in the healing arts can be accomplished successfully even if the patient withholds some information or exhibits a modicum of self-denial. A psychotherapist needs full disclosure even if the patient's thoughts are irrational or seemingly unconnected to the present circumstances.

[30/] The definition contained in Proposed Rule 504(a)(2) was imported from one state statute that was the result of parochial political battles fought long ago: "The restricted definition of 'psychotherapist' in Rejected Rule 504(a)(2) is taken from the seminal Connecticut statute. That statute appears to have been based less on principle than on the drafter's appraisal of the politics of the time in Connecticut. It is difficult to see any policy reason for the restrictions." 25 Wright & Graham, *supra*, § 5525, at 176.

For this and other reasons, one pair of respected commentators has urged that the definition of "psychotherapist" under Proposed Rule 504(a)(2) "is inadequate to the purposes (continued...)

B. Congress and the Executive Branch Have Expressly Protected Mental Health Communications.

Congress has recognized the need for mental health confidentiality. *E.g.*, the Mental Health Systems Act of 1980, Pub. L. No. 96-398, 94 Stat. 1565, codified as amended at 42 U.S.C. § 9401 *et seq.* (1995). The Bill of Rights in that Act explicitly confirms the patient's "right to confidentiality" of mental health records. 42 U.S.C. § 9501(1)(H). Such records also are exempt from the Freedom of Information Act's disclosure requirements (Pub. L. No. 89-554, 80 Stat. 383, codified as amended at 5 U.S.C. § 552(b)(6)) and subject to the Privacy Act of 1974's mandate that federal agencies promulgate special rules restricting their disclosure (Pub. L. No. 93-579, 88 Stat. 1897, codified as amended at 5 U.S.C. §§ 552a(b), 552a(f)). See, *e.g.*, 20 C.F.R. § 401.105(e) (requiring confidentiality of information maintained by, *inter alia*, any "psychological" professional under Social Security contract); 45 C.F.R. § 1304.3-8(b) (Health and Human Services regulation requiring confidentiality of mental health care information).

In connection with the Mental Health Systems Act, Congress explained:

> The Committee recognizes the need to assure the confidentiality and privacy of the treatment relationship in the field of mental health. It is an accepted premise that the capacity of a mental health professional to help his or her patient is strongly related to the patient's willingness to talk freely and open-

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[20](...continued)
of the privilege and should not be used by courts in developing a common law privilege under Rule 501." *Id.* at 173-74. In fact, since Rule 504(a)(2) was proposed, Connecticut's privilege statute has been amended to include social workers. Conn. Gen. Stat. Ann. § 52-146(q).

> ly. That willingness is in turn often dependent on the patient's belief that his or her communications are confidential.
>
> The Committee realizes that it would be quite difficult to provide mental health treatment without being able to assure the patient of confidentiality, privacy, and indeed, *privileged communication*. The Committee believes that *the treatment relationship is comparable to that of a priest/penitent or lawyer/client*.
>
> Patients not only disclose the very depths of their consciousness, but also their unconscious fears, feelings and attitudes. The Committee believes that confidentiality is a sine qua non for successful mental health treatment. Without a secure environment in which patients can communicate with the confidence that they are free from others knowing what may be said, all of mental health care would be destroyed.

S. Rep. No. 712, 96th Cong., 2d Sess. 93 (1980), reprinted in 1980 U.S.C.C.A.N. 3372, 3460 (emphasis supplied).

Congress reiterated this judgment in the Protection and Advocacy for Mentally Ill Individuals Act of 1986, Pub. L. No. 99-319, 100 Stat. 478, codified as amended at 42 U.S.C. §§ 10801-10851. Congress restated the Bill of Rights that it had adopted in 1980, including the patient's "right to confidentiality" of mental health information. 42 U.S.C. § 10841(1)(H). The statute also requires that the confidentiality of patient information be maintained throughout mental health protection and advocacy systems. 42 U.S.C. §§ 10806(a). Congress broadly recognized the qualified mental health professionals who deliver care under the Act "to include mental health specialists who are licensed or certified by the state, or where no state licensure exists, possess national licensure or certification." S. Rep. No. 109,

99th Cong., 1st Sess. 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 1361, 1368-69.

Congress also has expressed the need for confidentiality in the treatment of alcohol and drug abuse, both of which are closely related to and often overlap with mental health care. A federal statute mandates the confidentiality of patient information pertaining to "substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States." 42 U.S.C. § 290dd-2(a). See also 42 C.F.R. §§ 2.3(b)(1), 2.13(a), 2.63 (restricting disclosure of substance abuse patient records, including in any "civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority").

Congress observed that "the strictest adherence" to such confidentiality provisions "is absolutely essential to the success of all drug abuse prevention programs. * * * Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome." H.R. Rep. 775, 92d Cong., 2d Sess., as reprinted in 1972 U.S.C.C.A.N. 2045, 2072. See also S. Rep. No. 1206, 94th Cong., 2d Sess. 116 (1976), reprinted in 1976 U.S.C.C.A.N. 6355, 6408 (explaining that confidentiality of substance abuse information is necessary because prior to such protection "large numbers of addicted veterans who might otherwise have sought VA treatment probably did not do so, for fear that the fact of their disability and confidential information revealed during treatment would be available for easy distribution and circulation").

C. Every State Recognizes the Psychotherapist-Patient Privilege.

Congress did not limit federal courts to those privileges that were recognized under English common law, but instead anticipated that federal courts would look to the common law as developed in the states. See Cerveny & Kent, *Evidence Law*, *supra* n.11 at 811. Indeed, this Court has considered "state privilege laws in determining whether to retain them in the federal system." *Gillock*, 445 U.S. at 368 n.8. See also *Jaffee*, 51 F.3d at 1356-57.[21] As petitioner concedes, *all fifty states and the District of Columbia have adopted a*

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[21] As the Court of Appeals observed (51 F.3d at 1356-57):

> [T]he law of privilege as developed by the states is not irrelevant as the Supreme Court "has taken note of state privilege laws in determining whether to retain them in the federal system." *United States v. Gillock*, 445 U.S. 360, 369 n.8, 100 S.Ct. 1185, 1191 n.8, 63 L.Ed.2d 454 (1980); see also *Memorial Hospital v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (quoting *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)) ("'[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy'"); *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) (federal courts are not precluded from "resort[ing] to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled"). The widespread recognition of the psychotherapist/patient privilege in all fifty states is strong evidence that "experience with [the privilege] has been favorable." *In re Doe*, 964 F.2d at 1328.

privilege for therapists and other mental health professionals.[32] Pet. Br. at 31. The District of Columbia and at least forty-two states expressly include a privilege for confidential communications to a social worker.[33] To be sure, the states have developed variations on the theme, but state law offers

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[32] See Ala. Code § 34-26-2; Alaska R. Evid. 504; Alaska Stat. § 08.86.200; Ariz. Rev. Stat. Ann. § 32-2085; Ark. R. Evid. 503; Cal. Evid. Code § 1010 *et seq.*; Colo. Rev. Stat. § 13-90-107(g); Conn. Gen. Stat. § 52-146c; D.C. Code Ann. § 14-307; Del. R. Evid. 503; Fla. Stat. Ann. § 90.503; Ga. Code § 24-9-21; Haw. R. Evid. 504.1; Idaho Code § 54-2314; 740 ILCS 110/1 *et seq.*; Ind. Code Ann. § 25-33-1-17; Iowa Code Ann. § 622.10; Kan. Stat. Ann. § 74-5323; Ky. R. Evid. 506, 507; Ky. Rev. Stat. § 421.215; La. Code Evid. Ann. Art. 510; La. Rev. Stat. Ann. § 13:3734, § 37:2363; Me. Rev. Stat. Ann. tit. 32, § 7005; Md. Code Ann. Cts. & Jud. Pro. § 9-109; Mass. Gen. Laws ch. 233, § 20B; Mich. Comp. Laws Ann. § 330.1750; Minn. Stat. § 595.02; Miss. Code Ann. § 73-31-29; Mo. Rev. Stat. Ann. § 337.055; Mont. Code Ann. § 26-1-807; Neb. Rev. Stat. § 27-504; Nev. Rev. Stat. § 49.215, *et seq.*; N.H. Rev. Stat. Ann. § 330-A:19; N.J. Stat. Ann. § 45:14B-28; N.M. Stat. Ann. §61-9-18; N.Y. Civ. Prac. L. & R. § 4507; N.C. Gen. Stat. § 8-53.3; N.D. R. Evid. 503; Ohio Rev. Code Ann. §§ 2317.02, 4732.19; Okla. Stat. Ann. tit. 12, § 2503; Or. Rev. Stat. § 40.230; 42 Pa. Cons. Stat. Ann. § 5944; R.I. Gen. Laws § 5-37.3-4, § 5-37.3-6; S.C. Code Ann. § 44-22-90; S.D. Codified Laws Ann. § 36-26-30; Tenn. Code Ann. § 24-1-207, § 63-11-213; Tex. R. Evid. 509; Tex. Rev. Civ. Stat. Ann. § 611.002; Utah R. Evid. 506; Utah Code Ann. § 58-60-102; Vt. R. Evid. 503; Vt. Stat. Ann. Tit. 12, § 1612; Va. Code § 8.01-400.2; Wash. Rev. Code Ann. § 18.8.110; W.Va. Code § 30-30-12; Wis. Stat. Ann. § 905.04; Wyo. Stat. Ann. § 33-27-113.

[33] Contrary to the petitioner's assertion, Utah *does* specifically protect communications to social workers. See Utah R. Evid. 506.

a resounding endorsement of the general principle that communications with a psychotherapist ought to be kept confidential and shielded from discovery.

Of course, as petitioner points out, there are exceptions and limitations to the therapist privilege under state law. Pet. Br. at 31-38. However, this not only confirms that such privileges exist to begin with, but also demonstrates that the states are in general agreement as to the scope of the privilege and its exceptions.

For example, all states allow or require the divulging of otherwise confidential mental health communications when necessary to prevent harm to the patient or third parties. See Comment, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. Cin. L. Rev. 797 (Winter 1992); Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. Sch. J. Hum. Rts. 711 (1993).[34] Likewise, no state permits a litigant who puts his mental condition at issue to stand behind the therapist-patient privilege to bar discovery of therapy records which *the litigant* has made relevant to the action. See n.32, *supra*.

D. Common Law Rights to Privacy Support a Psychotherapist-Patient Privilege.

The special concern at common law to prevent disclosure of highly personal facts bolsters the conclusion that "reason and experience" warrant protection of communications between therapists and patients. This Court has recognized the common law privacy interest in "keeping personal facts away from the public eye" and in "the individual's control of information concerning his or her person." *United States Dep't of Justice v. Reporters Comm. for Freedom of*

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[34] Most states also permit or require reporting of past or intended child abuse. Levine, *A Therapeutic Jurisprudence*, *supra*.

the Press, 489 U.S. 749, 763, 769 (1989). See also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (characterizing "the right to be let alone" as "the right most valued by civilized men"); Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890-1891) ("The common law secures to each individual the rights of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. * * * [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them"), quoted in *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764 n.15.

Thus, for example, this Court has indicated that there are substantial individual privacy interests that weigh heavily against disclosure of patient prescription drug information (*Whalen v. Roe*, 429 U.S. 589, 605 (1977)) and criminal rap sheets (*Reporters Comm. for Freedom of the Press*, 489 U.S. at 771). This Court also has observed the individual's "interest in preserving the confidentiality of sensitive information" from psychological aptitude test results. *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301, 318 & n.16 (1979).

The privacy interests in communications between a patient and mental health professional are of at least an equal magnitude. Both federal and state law expressly limit the dissemination of such information. See *Reporters Comm. for Freedom of the Press*, 489 U.S. at 764-65 (finding support for privacy interest in federal statutes and regulations limiting disclosure); *Detroit Edison Co.*, 440 U.S. at 318 n.16 (same). There are few more personal, private and sensitive facts warranting protection from disclosure in our society than those relating to one's own mental health and emotional well-being. See, *e.g.*, *In re Doe*, 964 F.2d at 1328 (communications with psychotherapists often involve highly personal matters, the disclosure of which "would frequently be embarrassing to the point of mortification for the patient");

Developments in the Law, Privileged Communications, 98 Harv. L. Rev. 1530, 1544-47 (1985) ("Compelled disclosure of information communicated by a patient to a psychotherapist will therefore often threaten the privacy of the patient's most intimate thoughts").

E. The Psychotherapist-Patient Privilege Does Not Cause Undue Hardship or Injustice.

As shown in Section I, psychotherapy brings enormous benefits to society. It alleviates pain and suffering and may well make a violent world safer. Also, as shown in Section I, the benefits of psychotherapy may be lost if the confidentiality of the psychotherapeutic relationship is threatened. Weighed against this tragic loss is petitioner's hodge-podge of phantom harms. None of the asserted harms outweighs the value of the privilege.

First, petitioner fears that "[c]rucial evidence would be excluded" under "the broad privilege sought by respondents." Pet. Br. at 21.

Petitioner's arguments are directed against a strawman, depending on the premise that the Seventh Circuit adopted a rule of "absolute confidentiality" or "complete secrecy." Pet. Br. at 26-27. Nowhere did the Seventh Circuit so hold or even intimate. To the contrary, the Court of Appeals repeatedly stated that it was affording protection only to the confidential communications before it and was deferring comment on the privilege's scope and exceptions to future cases. *Jaffee*, 51 F.3d at 1357 ("However, we also note that the privilege we recognize in a case of this nature requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests"); *ibid.* ("We decline to speculate as to what situations would call for the abrogation of this privilege. Instead, we confine our analysis to a factual situation of this nature"); *id.* at 1358 ("Based on the facts and circumstances presented in

this record, we recognize the existence of the psychotherapist/patient privilege").[35/]

In any event, this Court need not today delineate the full contours of the therapist-patient privilege. Like other privileges, the lower courts should develop its scope and exceptions on a case-by-case basis, in the concrete factual settings necessary to resolve such disputes properly. See *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981). Thus, petitioner's suggestion that any recognition of the privilege automatically will foreclose certain areas of inquiry should not be credited. The federal courts are more than capable of evaluating the interests involved in particular factual settings. See, *e.g.*, *In re Zuniga*, 714 F.2d 632, 639-40 (6th Cir.) (weighing competing interests in determining whether specific information sought is protected under psychotherapist-patient privilege), cert. denied, 464 U.S. 983 (1983).

In addition, given the broad discretion of federal trial judges in passing on evidentiary issues, it is very unlikely that "crucial" evidence ever will be excluded. And even if some evidence *is* excluded, there is no reason to assume that it is more important for a litigant to have a particular piece of evidence—what a patient told a therapist—than for a patient to keep that same information confidential. Where the litigation does not itself arise from the therapy, it does no harm to prefer the value of confidential therapy over the value of discovering every last detail of a litigant's private thoughts and feelings. In this "information age," in which strangers know our addresses, telephone numbers, credit card balances, health status and buying preferences, it is more than appropriate to draw the line at psychotherapy—even

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[35/] Moreover, all fifty states have recognized the privilege and managed to craft exceptions to ensure the fair administration of justice. There is no reason to expect any less of the federal judiciary. Cf. Pet. Br. at 40 (arguing in favor of allowing the trial court to exercise discretion).

with a social worker—as one of the last bastions of confidentiality. See *Trammel*, 455 U.S. at 51 (courts should recognize a privilege when it promotes sufficiently important interests to outweigh the need for probative evidence).

Moreover, the probative value of therapy communications is highly speculative. The statements patients make in therapy do not always correspond to reality. As noted above, Freud encouraged patients to say anything coming to mind, from the undesirable to the irrational. See Section I, *supra*. As Dr. Slovenko has pointed out, "[i]n psychotherapy, the patient reports whatever goes through his mind. Saying all is the desideratum."[36/] The focus of psychotherapy is often to induce feelings or statements which the patient may not even realize he possesses or is capable of, so that "treatment is directed primarily toward the feelings and attitudes which are unacceptable to the patient and others."[37/] Thus, what a psychiatric patient says is not always what he believes or what corresponds to reality, for frequently the statements "are not 'facts.' Psychic reality is not the same thing as actual reality."[38/] This is hardly "crucial evidence."

F. Proposed Rule 504 Does Not Adequately Protect Confidential Mental Health Communications.

Recognizing the likelihood that this Court will adopt some form of psychotherapist-patient privilege, petitioner next urges that the privilege be limited to the text of proposed Rule 504. Pet. Br. at 39. This transparent attempt to "lose the battle but win the war" would not serve federal policy. First, as noted above, this Court need not adopt so rigid a rule. It makes more sense to allow the lower courts

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[36/] Slovenko, *Psychiatry and a Second Look*, *supra* n.3 at 186.

[37/] *Id.* at 194.

[38/] *Ibid.*

to flesh out the details, such as which kind of professional may engage in privileged therapy.

Second, proposed Rule 504 is limited to physicians and psychologists, but psychotherapists (whether or not they meet the requirements of Rule 504) deal with patients who require confidentiality. See Section I, *supra*. For instance, at Menninger, patients are treated by a "core treatment team," consisting not only of a psychiatrist and psychologist, but also of a psychiatric social worker, a registered nurse with advanced training in psychiatric nursing and an activity therapist. Petitioner's position would invade the confidentiality of the work of this team simply because of the participation of mental health professionals other than psychiatrists and psychologists.

Moreover, limiting the privilege to the confines of proposed rule 504 would effectively eviscerate it for a significant proportion of those in therapy. In today's "managed care" environment, plan sponsors strictly limit mental health resources, frequently requiring that patients see social workers and not psychiatrists or psychologists. See Wright & Graham, *supra*, § 5525, at 177 (citing study finding that 73% of those seeking treatment for mental illness were treated by social workers, nurses, and other unlicensed professionals). As a participant in managed care, Menninger has experienced this first-hand, and must respond by designing a treatment plan accordingly. Thus, for many insured Americans, a privilege limited to psychiatrists and psychologists is no privilege at all.

Indeed, in this case, Marylu Redmond sought counseling not from some itinerant clinical social worker, but from her employee assistance program ("EAP") at work. EAPs are common in today's workplace and succeed only because the employee is promised that the therapy will be provided in strict confidentiality. Menninger has been retained for a number of EAPs. The fact is that, mainly due to cost containment efforts, EAPs are staffed principally by social

workers, not psychiatrists and psychologists. Workers who cannot afford private therapy should be able to seek assistance through their EAPs without fear of exposure. Viewed from another perspective, employers should be able to offer their employees access to confidential therapy through an EAP as a means to increase their productivity and well-being. Proposed Rule 504 does not accomplish this because social workers are the primary clinicians in EAPs.

Finally, the regime contemplated by proposed Rule 504 would add to the already large disparity in mental health care available to the wealthy and the poor. As noted above, insurance plans normally cover therapy only by a social worker. In many cases, employees will not be able to afford to "opt out" of the insurance plan's limitations. Thus, excluding social workers would accomplish nothing other than to create a double standard: wealthy patients who can afford psychiatrists and psychologists would be entitled to confidential therapy, while the poor and minorities, who often receive therapy from social work agencies, would have to bare their souls to any lawyer who serves a subpoena.

Reason and experience teach that social workers should not be excluded. The psychotherapist-patient privilege should be available to all patients and should be applied on a case-by-case basis by the lower courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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